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BOOTH v. MARYLAND AND THE INDIVIDUAL VENGEANCE RATIONALE FOR CRIMINAL PUNISHMENT

Paul Boudreaux*

I. INTRODUCTION

The reaction of a murder victim's family to the homicide is inadmissible at the sentencing phase of the trial, according to the recent Supreme Court ruling in *Booth v. Maryland*.[1] The five-member majority held that testimony by members of a victim's family violates the eighth amendment by improperly shifting the focus away from the blameworthiness of the defendant.[2] However, four dissenting justices maintained that such testimony should be admissible because the harm incurred by a victim's family is an acceptable factor in determining society's reaction to the crime.[3]

The apparent amenability of four justices to allow a sentencing trial to shift at least partially away from a traditional evaluation of the blameworthiness of the defendant and toward the harm incurred by others raises questions concerning the purposes of punishment for major offenses. These questions include broad philosophical issues that the Supreme Court did not discuss. The most important of these issues is whether the commonly mentioned "retributive" rationale for criminal punishment can be used to justify the dissenters' conclusion that the court should admit testimony from the victim's family into evidence, or whether a different, and perhaps more subtle, rationale for punishment better justifies the admission of such testimony.

This Article focuses on how evidence of the effect of crime on

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1 107 S. Ct. 2529 (1987).

2 Justice Powell wrote the majority opinion and was joined by Justices Brennan, Marshall, Blackmun, and Stevens.

3 Justices White, Scalia, and O'Connor, and Chief Justice Rehnquist dissented.

its victims and their families can support or debunk rationales for criminal punishment. Using a utilitarian, economic, and individual-oriented approach, the Article concludes that social "retribution"—the socially oriented notion of "just deserts"—cannot stand as a rationale for criminal punishment. Instead, the Article suggests acknowledging an individual-oriented "vengeance" rationale for criminal punishment, based on the observed visceral satisfaction felt by *individuals* in society as the result of seeing a criminal punished for his crime.

The distinction between social retribution and individual vengeance is that the former is supposedly a socially created notion that the criminal "deserves" punishment, whereas the latter is an individual-oriented observation that *individuals* in society gain individual satisfaction from knowing that a criminal is being punished. Aggregated individual vengeance can fit easily into utilitarian and economic models of human and governmental behavior. Social retribution, on the other hand, must rest on some uneasy notion of natural law that commands punishment, even if the punishment does not necessarily further any individual's utility.

Moreover, the distinction between social retribution and individual vengeance is not merely a philosophical matter of labeling a rationale for punishment. If we accept individual vengeance and not social retribution as a reason to punish, we may more readily accept evidence of the effects of a crime on a victim or the victim's family, such as that offered in *Booth*. Finally, the switch does not merely expand evidence in a criminal case; rather, the switch provides social libertarians with a powerful weapon with which to argue the unjustifiability of criminalizing acts such as homosexual activity solely on moral grounds.

II. *BOOTH V. MARYLAND* AND THE QUESTION OF PUNISHMENT

Evidence of the effect of a felony on the victim or the victim's family became admissible in Maryland through a law that required the filing of a victim impact statement (VIS) by the State Division of Parole and Probation.[4] The VIS, which the prosecutor could read to the jury, had to include information such as "any change in the victim's personal welfare or familial relationships as a result of the offense," and "any economic loss suffered by the victim as a result of the offense."[5]

The *Booth* case itself involved a gruesome double-murder fol-

[4] MD. CODE ANN. § 4-609(c) (1986).
[5] *Id.* § 4-609(c)(3)(ii), (iv).

lowing an attempt to rob the victims' home in Baltimore.[6] The victims' bodies were discovered two days later by their son.[7] A jury found the defendant John Booth guilty of first-degree murder.[8] At the sentencing phase, the "[d]efense counsel moved to suppress the VIS on the ground that the information [it contained] was both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment."[9] After the trial court denied the motion, the prosecutor read the VIS to the jury, and the jury sentenced Booth to death.[10] The Maryland Court of Appeals affirmed the conviction and the sentence.[11]

The VIS in the *Booth* case included very emotional statements by the victims' son, daughter, and granddaughter.[12] The family members described the emotional trauma and pain that they experienced as a result of the murders, as well as the personal qualities of the victims.[13] In addition, the VIS included the relatives' impressions of the crime itself and even their assessments of the defendant.[14] The VIS concluded with the comment that "[i]t is doubtful that [the relatives] will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."[15]

The Supreme Court majority opinion, written by Justice Powell, held the VIS inadmisssible because of the need in a capital sentencing hearing to focus on the circumstances of the *crime*, such as the level of brutality, and on the nature and blameworthiness of the *defendant*.[16] Justice Powell stated that, "[t]he focus of a VIS, however, is not on the defendant, but on the character and reputation of the victim and the effect on his family."[17] Justice Powell added that

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6 The victims, Irwin Bronstein, age 78, and his wife Rose, age 75, were each "bound and gagged, and then stabbed repeatedly in the chest with a kitchen knife" by defendant John Booth and Willie Reid, who were neighbors of the Bronsteins, and who apparently entered the home in an attempt to steal money. 107 S. Ct. at 2530.

7 *Id.*

8 *Id.*

9 *Id.* at 2532.

10 *Id.*

11 *Id.* at 2530 (citing Booth v. Maryland, 306 Md. 172, 507 A.2d 1098 (1986)).

12 *Id.* at 2536-39 (complete VIS included in appendix to decision).

13 *Id.* at 2537-38. The son said that he suffered depression and lack of sleep; the daughter said that she suffered depression and could no longer look at kitchen knives without being reminded of the murders. The granddaughter described how the murders had forced her to seek counseling and had ruined her sister's wedding. *Id.*

14 *Id.* at 2538 (daughter stating that "the people who did [the murder] could [n]ever be rehabilitated").

15 *Id.* at 2539.

16 *Id.* at 2532 (citing Zant v. Stephens, 462 U.S. 862, 879 (1983)).

17 *Id.*

"[t]hese factors may be wholly unrelated to the blameworthiness of a particular defendant."[18]

Admitting statements from the VIS, Justice Powell continued, "could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime."[19]

The majority clearly adhered to the viewpoint that *blameworthiness* operates as the sole criteria by which the level of punishment should be determined. This blameworthiness, debated at length in most capital murder cases, focuses on the defendant. A jury deciding whether to impose the death penalty, for example, may consider "aggravating circumstances" of the defendant's crime, such as the gruesomeness of the murder or whether it was committed along with another felony.[20] Similarly, the jury must also consider "mitigating factors" concerning either the crime or the defendant as an individual.[21] In all cases, the focus must remain on the defendant, as presented through evidence of his crime and worth as an individual. As explained in *Booth*, a majority of the Court would *not* allow factors unrelated to the inherent blameworthiness of the individual—factors such as the level of sorrow, anger, or resentment caused by the murder—to enter the jury's calculus.[22]

Following this traditional analysis, the *Booth* majority found a number of fatal flaws in allowing evidence of the murder's impact on the victim's family to affect the level of punishment. The defendant cannot control, and in most cases does not even know, the extent to which the murder will affect the family members[23] or whether the family members are articulate or persuasive in expressing their

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18 *Id.*

19 *Id.*

20 *See* Gregg v. Georgia, 428 U.S. 153, 197-204 (1976)(plurality opinion)(affirming imposition of death penalty when jury has found beyond a reasonable doubt that the defendant's crime involved special "aggravating circumstance," such as whether it was "particularly heinous" or was committed in the course of another capital felony).

21 *See* Woodson v. North Carolina, 428 U.S. 280, 300-03 (1976)(plurality opinion)(striking down North Carolina's mandatory death penalty for murder, ruling that defendant must be given opportunity to present to jury evidence "of the character and record of the individual offender").

22 *Booth*, 107 S. Ct. at 2536.

23 *Id.* at 2534. In some cases, the Court noted, the victim will not even leave behind a family, in which case the defendant will presumably benefit from a lack of family testimony. *Id.*

grief, as were the family members in *Booth*.[24]

Furthermore, the Court explained that it could find no justification for permitting the character of the victim to affect the level of punishment.[25] Introducing evidence of the character of the victim, the Court continued, would undoubtedly lead to a "mini-trial" of the victim, which would pose significant difficulties for the defense and would "distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."[26]

Finally, the Court addressed the introduction of family members' personal opinions and characterizations of the crime and the defendant. The majority stated that such evidence serves only to "inflame the jury," adding that the decision to impose the death penalty must be " 'based on reason rather than caprice or emotion.' "[27]

In short, the majority in *Booth* determined that a death penalty hearing must *not* become analogous to a tort suit, in which the amount of liability often depends on the characteristics of the victim and the victim's family.[28] There is to be no rule that the murderer "takes his victim as he finds him."[29] In other words, an offender must not be penalized more or less based on the family's love for the victim or the victim's support of the family. Most of the aspects of the Maryland VIS criticized by the majority—whether the victim was loved, whether the family members could express their grief persuasively, and the "mini-trial" concerning the victim—are in fact regular features of wrongful death trials.[30] The majority in *Booth* rejected the tort focus on both offender and victim in favor of an evaluation based solely on the blameworthiness of the defendant. If

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24 *Id.* ("Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant . . . should live or die.").

25 *Id.* The Court maintained that there was no "principled way to distinguish cases in which the death penalty was imposed, from the many [cases] in which it was not.' " *Id.* (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)). What the Court apparently meant by this statement is that there is no way to distinguish the cases on grounds that *it* deems constitutional.

26 *Id.* at 2535.

27 *Id.* at 2536 (citing Gardner v. Florida, 430 U.S. 349, 358 (1977)).

28 *See* G. DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS §§ 6-4, 6-10, 6-17, 6-19, 6-20 (2d ed. 1988)(damages are calculated to compensate for actual injuries suffered by plaintiffs).

29 *See id.* at §§ 6-10, 6-15, 6-17, 7-1 (damage calculations are based on individualized factors).

30 See *id.* at §§ 8-1, 8-2, 8-3, 8-4, 8-5 (damage calculations in wrongful death cases involve inquiry into victim's entire life).

one accepts this criterion as the proper conception of criminal justice, then there exists little doubt that *Booth* was rightly decided on all counts.

Yet four Justices, Chief Justice Rehnquist and Justices White, O'Connor and Scalia, dissented from the Court's opinion, arguing that the testimony of a murder victim's family is constitutionally admissible. Although the two separate dissenting opinions by Justice White and Justice Scalia are both short and conclusory, Justice Scalia raised the key issue addressed in this Article.

Justice White maintained in his dissenting opinion that the

> affront to humanity of a brutal murder such as petitioner committed is not limited to its impact on the victim or victims; a victim's community is also injured, and in particular the victim's family suffers shock and grief of a kind difficult even to imagine for those who have not shared a similar loss.[31]

While this is true, the point of the majority opinion was that *blameworthiness* of the defendant, not factors outside the control of the defendant, is the only valid criterion.[32] Justice White contested the majority's principal holding by observing that the harm to the victim's family is relevant in non-capital cases.[33] Justice White noted that since most jurors will look "less favorably" on the defendant who has caused suffering, there is "nothing aberrant" in allowing this "inclination" to be translated into a tougher penalty.[34]

Justice Scalia took a more focused and provocative approach in his dissenting opinion, criticizing the notion of blameworthiness as the sole determinant of punishment in death penalty cases. He first noted that the death penalty cannot be imposed for a murder attempt that does not succeed, even though whether the victim lives or dies may be wholly unrelated to "blameworthiness."[35] This point makes clear that, at least in some instances, one who attempts murder may be judged by factors totally out of his control.

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[31] *Booth*, 107 S. Ct. at 2539 (White, J., dissenting).

[32] *Id.* at 2532-36.

[33] *Id.* at 2539-40 (White, J., dissenting)(reckless homicide merits geater punishment than reckless driving, although the only difference may be that in first situation a pedestrian happens to be in the path of the car).

[34] *Id.* (White, J., dissenting). Justice White also based much of his argument on deference to the moral decision of the state of Maryland to include the VIS in the sentencing calculus of juries. Yet certainly the entire thrust of Supreme Court opinions regarding the death penalty since Furman v. Georgia, 408 U.S. 238 (1972)(striking down imposition of death penalty when broad discretion is granted to jury), as well as the moral command of the eighth amendment itself—no "cruel and unusual punishment"—requires the Supreme Court to reevaluate the "moral" decisions of state legislatures with regard to capital punishment.

[35] *Id.* at 2541-42 (Scalia, J., dissenting).

Justice Scalia also mentioned the recent "outpouring of popular concern for what has come to be known as 'victims' rights,' " which he defined as the consideration of factors such as "the amount of harm [the defendant] has caused to innocent members of society."[36] Apparently accepting this as a basis for determining the level of criminal punishment, Justice Scalia struck at the center of the blameworthiness fortress: "the principle upon which the Court's opinion rests—that the imposition of capital punishment is to be determined solely on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court."[37]

This extraordinary passage exposes a fundamental disagreement with the premise adopted by the majority of the Court. However, while the majority explicates and backs its viewpoint with the entire thrust of Supreme Court opinions of the past twenty years, Justice Scalia's conception raises crucial questions that he fails to answer. It is one thing to advocate the consideration of harm to victims' families, and another to fix that visceral feeling into a coherent scheme of criminal punishment.

III. A Proposal for a New Approach to the Rationale for Criminal Punishment

The validity of the comments of the majority and those of Justice Scalia depends on the purposes of criminal punishment for serious crimes. If, as the *Booth* majority intimates, blameworthiness and moral guilt are the primary focuses of punishment, then the majority's dislike of considering the level of "harm" caused (at least in murder cases) holds considerable intellectual strength. If, however, the justification for pinning punishment to retribution is intellectually shaky, then the minority's suggestion of considering harm to victims' families must be considered more closely.

This section approaches the purposes of punishment from a classically liberal, utilitarian angle. This discussion does not require a debate of any of the issues of Jeremy Bentham's "pleasure and pain" analysis[38] or recent economic analyses of the alleged rational

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36 *Id.* at 2542.

37 *Id.*

38 *See* J. Bentham, The Rationale of Punishment 19-41 (1830). Bentham stated that man's purpose is to maximize pleasure and minimize pain, and that government should facilitate this quest. From this he concluded that punishment of those on whom deterrence is "inefficacious"—the insane, intoxicated, or very young—ought not to be inflicted.

behavior of criminals.[39] Instead, all one needs to accept is a version of the Pareto optimality hypothesis,[40] which states that a change that makes at least one person worse off without making any other person better off is an undesirable—or "Pareto inferior"—change.

Bentham, who believed that criminal punishment was justified by a deterrence rationale, did not directly attack the rationale of retribution for criminal punishment.[41] Indeed, few have attacked the essential core of the retributive function because of the disconcerting gap that would result if retribution were discarded as a rationale for punishment.[42] Nearly everyone, including the most calculating utilitarian, doubtless accepts some notion of blameworthiness and moral guilt. Yet, the visceral feelings of disgust, anger, and passion that dwell inside persons confronted with a violent criminal should *not* be characterized as a demand for social retribution, as the term is usually defined. Rather, this feeling is better characterized, and better employed as a rationale for punishment, as an individual desire for vengeance—a word used despite its usual pejorative connotations.

Although social retribution and individual vengeance may appear synonymous, there is a significant distinction. Social retribution, as defined here, means that as a *society*, we must punish a criminal because he deserves punishment. Individual vengeance, as defined here, is an individual's desire to punish a criminal because the individual gains satisfaction from seeing or knowing that the person receives punishment. The definition may at first strike some as distasteful, but this analysis accurately reflects human feeling and appropriately fits within the framework of a utilitarian and just analysis of criminal punishment.

An explanation of the traditional rationales for criminal punishment[43] must precede a discussion of the proposed shift from social retribution to individual vengeance. The four broad traditional justifications for criminal punishment include: 1) deterrence, 2) retribution, 3) rehabilitation, and 4) incapacitation.[44] Deterrence, which refers to the disincentive effect on others of punishing a criminal, is occasionally challenged as a rationale, but remains the most popular

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39 *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 205-07 (3d ed. 1986).

40 *See, e.g.*, Coleman, *Efficiency and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 226-31 (1980).

41 J. BENTHAM, *supra* note 38.

42 A. EWING, THE MORALITY OF PUNISHMENT (1929)(criticizing retributive rationale).

43 In an economic analysis, it would be a Pareto inferior move to punish the offender, unless there is a justification for inflicting pain on him.

44 *See, e.g.*, P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 1-28 (2d ed. 1982).

justification among utilitarians and economists.[45] Rehabilitation, and its cousin, specific deterrence, refer to the effect of criminal punishment on a particular criminal's desire to break the law again.[46] Incapacitation, the simplest and least controversial justification, is simply based on the fact that, behind bars, a criminal has little opportunity to commit additional crimes, except those on other criminals.[47]

The most unfocused of the justifications is social retribution, which becomes all the more elusive by meaning different things to different people. The stock of commonly used expressions is testament to its nature: "eye for an eye," "just deserts," "moral punishment," "debt to society," "pay for the crime."[48] For present purposes, social retribution in its pure form connotes the notion that, by committing a crime, an offender automatically triggers a punishment. Whether the necessity for this punishment stems from God, morality, or society, the key element of pure social retribution is that the justification transcends individuals and depends on some larger source.[49] So defined, social retribution is not as broad as it might seem at first blush. First, it is related to but separate from the notion of proportionality, which states that different crimes must command different punishments because they are less blameworthy, and, thus, the criminal "deserves" less punishment.[50] Yet, proportionality can be viewed as simply a limitation on the rationales of deterrence, incapacitation, and rehabilitation. To see this, assume that these three rationales were the only ones for criminal punishment. All sentences would then be extreme, even for minor offenses such as jaywalking—a life sentence would deter nearly all jaywalking, incapacitate the jaywalker for the longest time, and en-

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45 *See, e.g.*, J. BENTHAM, *supra* note 38; R. POSNER, *supra* note 39; Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 956-57 (1966).

46 *See, e.g.*, P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 44, at 22-24.

47 *See, e.g.*, W. LAFAVE, MODERN CRIMINAL LAW 24 (2d ed. 1988); P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 44, at 22-24.

48 *See, e.g.*, W. LAFAVE, *supra* note 47, at 24.

49 *See, e.g.*, Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884). In this famous case, the Queen's Bench gave the death penalty to two shipwrecked men who had killed a third for sustenance. Although the court seemed to consider that the actions of the defendants were understandable, and even hinted that the Queen should commute the sentence—which she did—the court found itself bound by an immutable standard of morality: "We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy." *Id.* at 288.

50 The Supreme Court has occasionally used the "cruel and unusual punishment" clause of the eighth amendment to strike down punishment that it finds is disproportionate to the crime. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983)(life sentence for writing a bad check is too much); *but see* Hutto v. Davis, 454 U.S. 370 (1982)(forty years for possession and sale of nine ounces of marijuana is not too much).

sure that the jaywalker does not commit his crime again. Proportionality is the moral sense that extreme penalties for many crimes punish the offender too much for our sense of justice. Still, we can accept proportionality as a limiting factor on other rationales without accepting social retribution as a primary rationale for criminal punishment.

Moreover, social retribution as narrowly defined here does not include the rationale expressed by H.L.A. Hart in opposing Bentham's "excuses" from punishment in cases in which deterrence has no effect.[51] Hart argued that "infliction of punishment on those persons may secure a higher measure of conformity to law on the part of normal persons than is secured by the admission of excusing conditions," and that any increase in the number of excuses increases the opportunity to deceive courts, or at least may appear to potential criminals to increase this opportunity.[52] This argument, while criticizing Bentham, is actually a deterrence argument, *not* a social retribution one.

Indeed, many arguments commonly thought of as socially retributive are actually deterrence arguments. Consider the statement, "We need to maintain the moral fibre of society" by punishing a crime. Although couched in "moral" terms, it might in fact be an argument about deterrence. Similarly, Henry Hart's rationale for punishment—to stigmatize criminals as "immoral"—is another variation on how to discourage criminal behavior, not an argument for pure socially retributive punishment.[53]

In sum, the argument for social retribution boils down to the contention that criminals deserve punishment because they deserve punishment. This statement is even narrower than the statement that an act may be considered criminal because we decide to make it criminal, or, to summarize Lord Devlin, an act may become a crime because it is immoral and nothing else.[54] Even if we accept Lord Devlin's circularity we still could choose to label an act as immoral but not punish it.

Having narrowed the rationale of social retribution sufficiently, one can use a utilitarian, individual-oriented, economic approach to show that the rationale of pure social retribution cannot stand. An economic view of a governmental action such as criminal punish-

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51 *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 18-20 (1968); *see also* J. BENTHAM, *supra* note 38, at 23-26.

52 *See* H.L.A. HART, *supra* note 51, at 19-20.

53 *See* Hart, *The Aims of the Criminal Law*, 23 in LAW AND CONTEMP. PROBS. 401, 404 (1958).

54 P. DEVLIN, THE ENFORCEMENT OF MORALS 1-25 (1965).

ment analyzes the action's effects on the *individuals* in society, not on some amorphous allegation of "social good" outside the utility functions of individuals.[55] From an individual-oriented, economic viewpoint, deterrence, incapacitation, and rehabilitation can each be justified because the common purpose behind each rationale—cutting the amount of crime in the future—leads to the improvement of *individual* utility for future, albeit unknown, potential victims of crime.

The following hypothetical illustrates problems with the use of the social retribution rationale for criminal punishment, as well as the use of *only* the three utilitarian rationales. Consider a class of easily identifiable and psychopathic (but not insane) individuals upon whom we are certain criminal deterrence has no effect. Furthermore, assume that this type of individual will commit exactly one crime in his lifetime and then will cease criminal activity. Under the utilitarian theories of deterrence, incapacitation and rehabilitation there is no justification for punishing one of these individuals after he or she has committed the crime. The punishment, as assumed, will have no effect whatever on any future crimes by either this individual or any other person in the society.

The social retributionist must maintain, of course, that we must punish this individual because he or she must "pay" for the crime, and that social retribution alone justifies the punishment.[56] However, the utilitarian responds that this is both irrational and a Pareto inferior action. By punishing a person solely for social retribution, government is making one person worse off—the offender suffers in prison—while no one is made better off. It would be Pareto superior, the utilitarian argues, to allow the offender to go free, but perhaps with a stern notice that he or she has committed a crime, so as to notify others. The offender prefers this approach, the utilitarian concludes, while no other individual can seriously maintain that his interests have or will be harmed.

At this point, however, no one should be satisfied with the seemingly logical argument of the utilitarian. If a major crime, such as murder was involved, every law-abiding citizen would be up in arms, demanding punishment of the offender. Does this behavior

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[55] Some economists use this argument to criticize governmental actions, such as the support of the arts and Amtrak, that are alleged to be in "the public good," while not giving much benefit to many persons. *See* M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 68, 201-02 (1980).

[56] Advocates of a "natural law" of retribution may argue that this law has no limits. Immanuel Kant, for one, stated that even if all members of a civilization dispersed, leaving one condemned murderer to inhabit the old nation, that person still deserved to die. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (J. Ladd trans. 1965).

mean that nearly all members of society either act irrationally or reject utilitarianism in favor of amorphous notions of social retribution? On the contrary, members of society, by demanding punishment, express their own, *individual* desires to impose punishment. This desire is, for lack of a less perjorative term, the individual *vengeance* rationale for criminal punishment.

Individual vengeance is distinguished from social retribution in both abstract and concrete ways. First, on the economic level, individual vengeance can easily be incorporated into a utilitarian model of human behavior. Members of society gain satisfaction, or gain "pleasure," from seeing or knowing that a criminal offender receives punishment. Far from being a vulgar or undesirable human emotion, this satisfaction is an understandable and inescapable facet of human behavior. Every child who has either experienced harrassment or witnessed the abuse of a friend by a bully manifests this satisfaction when the bully gets his or her comeuppance. This same emotion, at different levels, exists in nearly every individual.

Consider the intensity of emotions of individuals in a society when a murderer is brought to trial.[57] Would there be such intense interest in seeing the criminal punished if what individuals were demanding was not an individual emotion but rather only their single share of some philosophical rationale of social retribution? Just as some individuals may wish to ameliorate the lives of those in poverty, not because of a notion of "social justice," but because of the satisfaction of helping the poor,[58] individuals may gain satisfaction in knowing that criminals receive punishment.

The notion that individual vengeance holds a negative connotation might explain why social retribution and not aggregated individual vengeance is commonly offered as a justification for criminal punishment. Whereas individual vengeance smacks of lawlessness and vigilantism, social retribution rings with social order and justice. This was especially true in an era where it was government's goal to rein in anarchy and offer the benefits of enlightened rule.[59] Today, there is no reason why a civilized government may not rationally

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57 Consider also the remarkable demonstration of emotion at the site of the execution in Florida of mass murderer Ted Bundy in January of 1989. Two thousand people—most of whom had no personal connection with Bundy's victims—congregated to cheer Bundy's death, while the execution became briefly the most anticipated event in the nation. Washington Post, Jan. 25, 1989, at A1, col. 2 (T-shirts read "Burn Bundy" and "Toast Ted"). This episode was an example of the aggregated desire for individual vengeance raised to a repulsively high level.

58 *See* M. FRIEDMAN & R. FRIEDMAN, *supra* note 55, at 139-40.

59 *See generally* T. HOBBES, LEVIATHAN (reprint of 1651 ed.)(arguing in favor of governmental "leviathan" to control horrible effects of human interaction).

justify criminal punishment partly on the aggregated desire of individuals in the society to see that a person who has broken its laws receives punishment.

Squeamishness about verbalizing the individual vengeance rationale may be a relatively new phenomenon. Sir James Fitzjames Stephen wrote in 1883 that no one in England regarded violent crimes such as murder, rape and theft "with any feeling but detestation," adding that "the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence."[60] Although one can view Stephen's comments as advocating social retribution,[61] they actually come closer to supporting this Article's rationale of aggregated individual vengeance.

Characterizing this justification for criminal punishment as aggregated individual vengeance rather than social retribution creates numerous intellectual and practical benefits. First, vengeance fits into the utilitarian, economic, and individual model of human and governmental behavior, while social retribution does not. Second, individual vengeance more accurately targets human emotions. Consider the conundrum of deciding punishment for two offenders—one who maliciously stabs a victim without causing permanent harm, and another who has defrauded a family out of half of their life's savings. Under a social retribution rationale, the second criminal might be at least as socially irresponsible and might have caused more lasting harm. Yet, why would many individuals believe that the first criminal should receive more punishment than the second?[62] Perhaps violent crimes stir more vigorously than financial crimes the natural emotions in persons not parties to the crimes. To return to the schoolyard example, both a bystander and a child knocked down in the mud by a bully burn more passionately for revenge than they might if the bully had "merely" extorted lunch money from the child.

Finally, of course, a rationale for criminal punishment based on aggregated individual desire for vengeance can incorporate what Justice Scalia in *Booth* called the "outpouring of popular concern for what has come to be known as 'victims' rights.' "[63] This is not a call

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60 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883).

61 *See* P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 44, at 2-3.

62 Social radicals may attempt to chastise social values in this circumstance by arguing that "middle class" values are threatened more by violence than by white-collar crime, and that extreme reactions to violent crime represent an attempt by the affluent to suppress the stirrings of the underprivileged. *See* W. LAFAVE, *supra* note 47, at 23-24 & n.* (statistics provide evidence of a pro-white-collar bias).

63 Booth v. Maryland, 107 S. Ct. 2529, 2542 (1987)(Scalia, J. dissenting).

for vigilantism or for allowing persons as emotionally involved as victims to dictate the punishment of offenders. Rather, the notion of "victim's vengeance" states that if vengeance of individuals is a valid rationale for punishment, courts and juries should prominently consider the feelings and desires of those who are the actual victims of the crime. To put it in economic terms, acknowledgement of the satisfaction or utility gained by individuals in society upon seeing that a criminal has received punishment compels the recognition that the greatest satisfaction, desire, and utility comes to the actual victim or the victim's family. In sum, if one accepts vengeance of individuals as a valid consideration, one should consider the desires of victims foremost.

The implications and problems of this theory of vengeance are addressed in Part IV. The theories in this Article, in stoking the fires of the debate, do *not* advocate an increase in the overall levels of punishment. Instead, it suggests a change in the calculus used to determine relative levels of punishment.

IV. IMPLICATIONS OF THE THEORY

If one accepts, as did the majority in *Booth*, that blameworthiness of the defendant is the sole criterion with which to determine the severity of criminal punishment, then the majority is clearly correct in holding the level of harm caused to the victim's family—a factor extrinsic to blameworthiness—is irrelevant. This Article shows, however, that an analysis of the underlying justifications for criminal punishment might change such an assumption. The desire for vengeance by individuals, not social retribution, must join deterrence, rehabilitation, and incapacitation. With this definition of aggregated individual vengeance as a justification for punishment, we must consider more closely Justice Scalia's exhortation that the sentencing jury may consider the extent of a murder's effects on the victim's family. Of course, acceptance of individual vengeance as a rationale for punishment allows for rejection of the use of testimony by the victim's family in deciding the severity of punishment. Nevertheless, Justice Scalia's argument carries added intellectual weight.

A. IMPLICATIONS FOR *BOOTH*

The term "victims' rights," Justice Scalia explained in his dissent in *Booth*, "describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions . . . the amount of harm [the defendant] has caused to innocent

members of society."[64] In a moderate form, such a consideration could take the form of allowing a range of sentences for a particular crime.[65] The judge or jury would determine the choice of punishment within that range based on both mitigating factors presented by the defendant *and* by evidence of the extent of the harm caused to the victim or the victim's family. This strays from the notion of blameworthiness as the only factor considered in fixing punishment.[66] However, if one accepts the notion of aggregated individual vengeance as a rationale for criminal punishment, one can more forcefully argue that the level of punishment, within bounds, should vary according to the level of vengeful desire felt among individual members of the society. Furthermore, if this vengeful desire receives consideration and weight, certainly the emotions of the actual victims or their families should receive foremost consideration.

This Article seeks only to stir a debate over the individual vengeance rationale for criminal punishment. Consequently, it does not address all of the ethical and moral questions raised by the rationale. However, one major problem that must be addressed is the fact that allowing consideration of a victim's vengeance might cause sentences to vary according to factors completely irrelevant to the defendant. This would be equivalent to the tort doctrine that the offender "takes his victim as he finds him"; if a tort victim has a high income or an articulate, loving family, the offender might pay more. In the criminal law context, this might mean a lesser punishment for the murder of a vagrant with no friends or family than for the murder of a person with an articulate, loving family. Such wide variations in criminal punishment for the same crime and blameworthiness might be ameliorated in a number of ways. For example, variations could be limited to a narrow range of punishments for each crime,[67] so as to ensure that the murderer of a vagrant is not treated less harshly than the person who commits a nonfatal assault and battery of a person with a loving family. In-

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64 *Id.*

65 The current federal sentencing guidelines mathematically calculate a range of punishment in which the judge may choose a sentence. *See* 18 U.S.C. §§ 3551-3586 (1982 & Supp. IV 1986); 28 U.S.C. §§ 991-998 (Supp. IV 1986). The amount of harm caused to a victim's family, for example, could be added to the factors that mathematically determine the range of possible sentences. *See* 28 U.S.C. § 994(c) (list of factors that are considered).

66 *See supra* notes 16-30 and accompanying text for discussion of the majority's argument in *Booth*.

67 The federal sentencing guidelines already provide for a mathematical calculation of a range of possible sentences. *See supra* note 65.

deed, any scheme that provided otherwise would seriously misjudge the levels of resentment felt in individuals not parties to the crime.

Finally, the punishment of murderers might just require a dose of tort doctrine. In tort law, we allow the level of damages to vary according to factors completely outside of the defendant's control because of our desire to accurately compensate victims for the injuries.[68] Analogously, to compensate accurately for the anguish and loss suffered by a murder victim's family, we might permit juries to consider varying the severity of punishment. In economic terms, juries may award a more severe sentence when it will create a significant increase in satisfaction for the victim's loving family. Likewise, when a person without a family is murdered, no family member is available to gain satisfaction from seeing the murderer punished.

This argument may at first seem callous or insensitive when a defendant's life is at stake, as in *Booth*. However, evidence of impact on the victim's family would constitute at most only one of a number of factors considered by a sentencing jury. As Justice Scalia wrote:

> To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.[69]

Justice Scalia did not mention that mitigating evidence relates to the blameworthiness of the defendant, whereas evidence of impact on the victim's family does not. Still, Justice Scalia is correct in noting that testimony from the victm's family would rarely be the only "emotional" evidence in the sentencing phase of a death penalty trial.

The majority in *Booth* objected to evidence from a victim's family for two reasons. First, the majority was concerned that such evidence would be inherently arbitrary; the impact of the family's evidence would vary greatly from case to case, depending on the articulateness and willingness of the family to testify. Second, the majority was disturbed that the defense would face the difficult and unpleasant task of trying to rebut the family's evidence.[70] In response, tort juries and defense attorneys successfully manage with such problems all the time, as do murder sentencing juries when presented with mitigating evidence about the defendant's character.

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[68] *See supra* notes 28-30 and accompanying text.

[69] Booth v. Maryland, 107 S. Ct. 2529, 2542 (1987) (Scalia, J., dissenting).

[70] *Id.* at 2534-35.

B. THE SCOPE OF VICTIM IMPACT EVIDENCE

What form should evidence of impact on victims take if deemed admissible? The mandatory Maryland Victim Impact Statement (VIS) was rather open-ended.[71] The statement admitted in *Booth* included detailed testimony of the anguish and suffering felt by the victims' family as well as the family's opinions of the nature of the crime and the probability of the defendant's rehabilitation.[72] Under a rationale that accepts family testimony because it recognizes the family's satisfaction from seeing punishment imposed, evidence of the family's anguish and suffering, as well as whether the family members desire a severe sentence, should be admissible. There is no justification, however, for admitting statements of the family's characterizations of the factual events of the crime.[73] The jury must learn facts from direct evidence, not from the potentially skewed impressions of persons who do not necessarily have first-hand knowledge of the facts.[74] Similarly, the lay opinions of family members about the defendant's chances for rehabilitation are worthless. In sum, if evidence of the impact of a murder on a victim's family members is admitted under a vengeance rationale, the evidence should be tailored and limited more so than the VIS in *Booth*. A proper VIS would eliminate prejudicial and irrelevant characterizations of fact that do not help the jury determine the extent of suffering by family members.

Furthermore, a fair and constitutional use of victim impact statements would include safeguards to ensure that such evidence does not become the focus of the trial. First, family evidence should not be admitted until a jury has found a murder defendant guilty and until the level of punishment is fixed within certain bounds. Second, the judge should admonish the sentencing jury to consider all evidence, including any mitigating evidence as well as evidence from the victim's family. Third, evidence of the family's financial losses should be excluded because such claims are the province of tort, not criminal law. Finally, lawmakers should closely question the usefulness of victim impact evidence with regard to crimes less serious than murder. In cases involving less serious crimes the individual vengeance arguments are weaker; still, the *Booth* Court did

71 *See supra* notes 4-5 and accompanying text.

72 *See supra* notes 12-15 and accompanying text.

73 The VIS in *Booth* included a statement by the victim's son that the victims were "butchered like animals." 107 S. Ct. at 2531. No doubt they were, but that was a question for the jury to decide on the evidence.

74 *See generally* FED. R. EVID. 602 (personal knowledge required).

not rule as unconstitutional the use of the VIS in other than capital murder cases.

C. IMPLICATIONS OF THE THEORY FOR CRIMINALIZATION

Part III of this Article set forth the theory that aggregated individual vengeance, not social retribution, is a valid rationale for criminal punishment. Although this proposal may have untoward consequences for some murder defendants, it does not necessarily justify a general increase in the levels of criminal punishment. Indeed, in the area of criminalization it argues for decriminalization of some acts.

An accepted premise of law in some quarters is that "morality" may be enforced by criminalization, even if there is no other justification for criminalization.[75] The Supreme Court has ruled the criminalization of "immorality" constitutional even when it involves intrusion into private acts of consenting individuals.[76]

A moral obligation to punish, based on social retributive grounds, buttresses the arguments for the criminalization of immoral acts. Such arguments do not fit, however, in a regime that punishes only when the punishment prevents future violations of individuals' interests (the rationales of deterrence, rehabilitation, and incapacitation) or gives direct satisfaction to individuals (individual vengeance). It is considerably more difficult for the government to justify criminalization of actions such as homosexual activities if it is forced to throw aside the cloak of social "morality" and identify specific groups of individuals who actually benefit from the criminalization of such acts. This argument against criminalization simply to enforce notions of pure "morality" is not new. It essentially restates John Stuart Mill's view that punishment is justified only when harm to another is shown.[77] Among modern commentators, H.L.A. Hart has advanced similar theories.[78] What is new is that if individual vengeance replaces social retribution as a rationale for punishment, the stance of the libertarians and economists is enhanced at the expense of moralists and retributionists.[79]

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75 *See* P. DEVLIN, *supra* note 54.

76 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986)(no privacy right to commit homosexual sodomy).

77 Mill stated that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." J. MILL, ON LIBERTY 9 (E. Rapaport rev. ed. 1978).

78 *See, e.g.*, Hart, *Immorality and Treason*, in 62 LISTENER 162 (1959).

79 For example, economic libertarians Milton and Rose Friedman are critical of criminalizing drug use on purely moral grounds because they argue that more persons

Consider the example of criminalization of homosexual acts. A moralist might contend that, because of some notion of perceived morality, we are entitled to punish homosexuals under the socially retributive rationale.[80] If a homosexual violates the supposed social fabric of morality, "society" is entitled to make him "pay" for his violation. Alternatively, if we require criminal punishment to be tied to some economic, individual utility-enhancing rationale, both the social fabric and retributive arguments crumble. Here, government must specify which individuals or group(s) of individuals are potentially benefitted by the criminalization. If government cannot specify potential beneficiaries, criminalization of the acts is a Pareto inferior move and cannot be justified.

Defenders of criminalization of homosexual acts might then retreat to the rationale that criminalization is justified because they and others in society gain satisfaction from knowing that those they find immoral are being punished. It is important to note, however, that this argument would be a significant step away from the old "social morality" argument. Moralists could not seriously argue that individuals gain utility from knowing that unknown homosexuals receive punishment in the same sense that a victim of a crime or the family of a murder victim gains utility from seeing the punishment of persons who have directly violated their individual autonomy, interests, or rights. Essentially the moralists' argument boils down to "it should be illegal because we want it to be illegal" and nothing else. This should not be considered a tenable stand in modern legal debate.

In sum, replacing the rationale of social retribution for criminal punishment with one of aggregated individual vengeance is not a call for greater punishment. Rather, it works hand in hand with the libertarian position on criminalization, which argues that acts should be criminalized only when individual members of society definitely benefit from criminalization.[81]

V. CONCLUSION

Arguments for criminal punishment based on social retribution,

would be better off if certain drugs were legalized. M. FRIEDMAN & R. FRIEDMAN, TYRANNY OF THE STATUS QUO 137-41 (1984).

80 *See, e.g.*, Note, *Behind the Facade: Understanding the Potential Extension of the Constitutional Right to Privacy to Homosexual Conduct*, 64 WASH. U.L.Q. 1233, 1233, 1244-50 (1986)(applauding Bowers v. Hardwick, 478 U.S. 186 (1986), both on constitutional and moral grounds, based on "society's disdain for homosexuality"); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215 (homosexuality is a "crime against nature").

81 *See supra* note 79.

general blameworthiness, and moral guilt are appealing in part because they seem innate and irrefutable. This Article contends, however, that when one approaches the issue of criminal punishment from an individual-oriented, utilitarian stance, the time-honored rationale of social retribution has little substance. Rather, the innate disgust for criminals felt by individuals is better characterized as a desire for individual vengeance which, when aggregated among individuals, provides a separate rationale for criminal punishment. Unlike social retribution, however, aggregated individual vengeance both fits into an economic model of punishment and more clearly reflects common human emotions.

Once we accept as a rationale for punishment the satisfaction gained by individuals from knowing that violent criminals receive punishment, we can consider more clearly the case for what Justice Scalia in *Booth* called "victims' rights."[82] In a murder case, the victim's family may suffer terribly, and their intense, personal desires to see harsh punishment imposed on the murderer reflects their anguish. We should not allow the family to dictate terms, but it may be desirable to allow sentencing juries, within boundaries, to consider the anguish of the family and the satisfaction and sense of justice they would receive from a stiff sentence. Such a policy is not necessarily completely desirable. However, the individual vengeance rationale for punishment may immeasurably advance the cause of "victims' rights."

82 Booth v. Maryland, 107 S. Ct. 2529, 2542 (1987) (Scalia, J., dissenting).